



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 69 OF 2019

CHINA ROAD AND BRIDGE CONSTRUCTION.....APPELLANT

VERSUS

JAMES PONDA.....RESPONDENT

(An Appeal from the judgement and decree of the Senior Resident Magistrate, Mariakani given on 16th January, 2018 in PMCC No. 250 of 2018 by Hon. L.K. Gatheru, Resident Magistrate)

Coram: Hon. Justice R. Nyakundi

Mr. Mogaka Omwenga for the appellant

Mr. Sewe Habil for the respondent

JUDGEMENT

The appellant, who was the defendant in the court below is dissatisfied with the judgement of the trial court dated 16th January, 2018 awarding Kshs.750,000 as general damages to the respondent and the plaintiff in the primary claim.

Factual Material

The facts of this case are straight forward; as read from the plaint filed in court on 13th June, 2016. On or about 21st November, 2015 the respondent sustained injuries in the course of his employment itemized as follows:

- (1) Traumatic amputation of the left middle finger.***
- (2) Traumatic amputation of the left ring finger.***

The issue of liability was settled at 80%:20% in favour of the respondent as against the appellant. The trial court after hearing the claim on assessment of damages awarded the aforesaid sum of Kshs.750,000 for pain, suffering and loss of amenities.

The appellant being dissatisfied with the assessment has now appealed to this court. The grounds of appeal of the appellant are as follows:

- (1) That the learned magistrate misdirected himself on the applicable principles of law by failing to consider the evidence and submissions on record.***
- (2) That the learned magistrate erred in law and in fact awarding excessive damages. As such the appeal be allowed with costs.***

The brief arguments by both counsels on appeal

Learned counsel for the appellant herein submitted that in the court below that it was contended that respondent be awarded Kshs.1,500,000 but at the end of it all Kshs.750,000 was assessed which they now challenge. The grievance according to learned counsel is that the award by its very nature is too high thus amounting to an erroneous estimate of the loss and damage. He referred to the case of **Ouru Super Stores limited v Jackson Karagon Obure (2018) eKLR** to demonstrate to this court that the whole award was misdirection at the laid down guidelines.

The second issue by learned counsel for the appellant was the fact of the authorities referred to and relied by the learned magistrate being at variance with the injuries sustained by the respondent. With this learned counsel also made reference to medical report by Dr. Ndegwa dated 6th June, 2016 whose contents contained the specific injuries and the prognosis.

Thirdly, learned counsel contention as I understand it, is that the trial court in awarding damages could have taken the liberty to place reliance to the relevant cases on the award of damages. He had in mind for example the case of **Blowplast Ltd v Julius Ondari (2018) eKLR**. On this learned counsel argued and submitted that an award of Shs.500,000 could have sufficed. Therefore, learned counsel submitted that there is every justification to interfere with the award of the trial court.

The respondent counsel in reply opposed the appeal by the appellant on stated grounds. He pointed out that learned appellant's counsel submissions on the issue of damages before the trial court are precise and clear. Learned counsel reiterated the costs referred to in support of the award as **Pretro Cannobio v Joseph Amani Hanzano (2016) eKLR** and **Daudi Sonje v Peter Wekesa Namutale (2016) eKLR**. According to learned counsel, it has not been shown considering the facts of the case which elements of the assessment was disregarded by the learned magistrate to arrive at an erroneous estimate of the damage.

Learned counsel submitted that the assessment of damages being partly discretionary and on the basis of the principles in **Ratilah Sumaria & another v Allied Industries Ltd Civil Appeal No. 203 of 2002** and **Mbogua Kiruga v Mugecha Kiruga & another CA No. 52 of 1985**. The appellate jurisdiction mandates the court to make any findings of fact, to draw inferences and conclusions of its own but it has no legal authority merely to substitute its own decision with that of the trial court.

Learned counsel argued and submitted that the award should not be disturbed on appeal as no part of it wrong principles or misdirection by the trial court has been identified by the appellant to the court.

Determination

It is well settled in various authorities and this has been in **Abok James Odera T/A A.J. Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates 2013 eKLR** and in **Kenya Ports Authority v Kuston (Kenya) Limited 2009 2EA 212**. That the first appeal court duty is to reconsider the evidence, evaluate and draw its own conclusions, though it should always bear in mind that it has neither seen or heard the witnesses and should make due allowance in that respect. Secondly, that the responsibility of the court to rule on the evidence on record is not to introduce extraneous matters not dealt with by the parties in the evidence.

In addition to this task of the appellate court as held in **Kemfro Africa Limited and another v A.M. Lubia and others 1987 KLR 27 1982-88 1KLR 727**, **Sheikh M. Hassan v Kamau Transporters and others (1982-88) 1KAR** "will not interfere with an award of damages by a trial court unless satisfied that the trial court in assessing the impugned damages took into account an irrelevant factor, or left out of account a relevant one, or that the assessment is so inordinately low or so high that it must be a wholly erroneous estimate of the damage."

Pursuant to the aforesaid legal position the genesis of the claim can be traceable to the personal injury suffered by the respondent. The injuries suffered are as documented in the oral evidence of the respondent and the medical report by Dr. Ndegwa. When computing damages some of the key highlights to weigh in the mind of the court as I see it would be the elements of pain and suffering and loss of amenities.

In the case of **British Transport Commission v Gourley (1955) ALL ER 796**, "it was observed that the phrase, pain and suffering has now become a term of art employed to describe the pain associated with the injury resulting from the damage suffered. The worst the injury, the greater the pain and suffering of a plaintiff who is aware that his expectation of life has been greatly affected and reduced by the injury. Hence when the plaintiff makes a full recovery from his injuries, almost all his general damages will come under the head of pain and suffering". "See also **United Bank for Africa Ltd Ali Ismaila v Mrs Ngozi Supreme Court of Nigeria SC 33 (1988)**."

Like pain and suffering the claimants in tort also seek compensation for loss of amenities. The character of this head is defined by **Birken LJ in Manley v Rubby Port-Land Cement Company Ltd (1952) CA No. 286**, where he said:

"There is a head of damage which is sometimes called loss of amenities; the man made blind by accident will no longer be able to see the familiar things he has seen all his life, the man who has both legs removed and will never again go upon his walking excursions – things of that kind – loss of amenities."

Basically, these are some of the underlying factors to answer for a fair compensation looking at a cumulative effect of the injuries under the head pain and suffering and loss of amenities.

As regards the point in issue the Court of Appeal in **Simon Taveta v Mercy Mutitu Njeru (2014) eKLR** held that:

"The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in part."

In the reasoning of the trial court and ramifications of the assessment in my view will turn on the bonafides of the principles elucidated in **Butler v Butler (1984) KLR 22** that:

1) An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.

2) *The award should be commensurate with the injuries sustained.*

3) *Previous awards in similar injuries sustained are mere guides but each case be treated on its own facts.*

4) *Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.*

5) *The awards should not inordinately low or high.”*

It is evident from the application of these principles that the trial court enjoys wide measure of discretion on the question of assessment of damages. Therefore being an appeal against the trial magistrate’ exercise of his discretion, to this court I am enjoined to treat the judgement appealed from with almost respect and should refrain from interference with it unless, the appellant bring itself within the principles in **Kemfro Africa Ltd** (supra).

As it turned out, the respondent award of damages was founded on the content and expert opinion given by Dr. Ndegwa in a medical report dated 6th June, 2016 admitted in evidence under Section 48 of the Evidence Act.

Certain key observations were made by the Doctor in the report that the respondent is a young man aged about 22 years due to the amputation of the left middle finger and left ring finger he has suffered inability to use the left hand because of the deformity and more so because he is left handed. So far as this case stands, he opined that the respondent injuries occasioned 10% permanent disability. That it would cause the respondent cosmetic embarrassment is real and it may be difficult to do fine work like working and the stump has left residual scars and chronic pain. It follows in my opinion that the pain and suffering and loss of amenities would be a solid fact to ground an assessment of damages by the trial court. This is a positive factor that was not controverted or rebutted by the appellant during the trial of the claim. Whether one is making reference to all decided cases in similar injuries and awards Lord Pearce expressed it well in **West & Son Ltd v Shephard (1963) 2 ALL ER 625 ER** when he said:

“The court has to perform the difficult and artificial task of converting into monetary damages the physical injuries and the deprivation and pain to give judgements for what it considers to be reasonable sum. It does not look beyond the judgement to the spending of the damages. The injured person may not even be in a position to enjoy the damages he received because of the injury which he has sustained.”

How does the assessment of damages stand judged against the list of similar injuries and awards?

From the facts on the case of **Pyramid Packaging Limited v Humphrey W. Wanjala (2012) eKLR** the court awarded Kshs.650,000 for amputation of the left index, middle and ring fingers. It was also noted that the plaintiff was left handed and the injuries rendered him incapacitated to work. In **Sino Hydro Corporation Ltd v Daniela Afila Kuminda (2016) eKLR** the plaintiff middle and ring fingers of the right hand were also amputated with a resulting 10% disability, an award of Kshs.600,000 was made in favour of the plaintiff.

The present case is in similar position as the award compares favourably with the situation at hand. Some of the arguments on submissions included the effects of the learned trial magistrate misdirecting herself when she assessed the damages at Kshs.750,000 instead may be Kshs.500,000.

There is no mention of the loss of amenities and impairment of working life of the respondent due to the injuries.

Having considered this matter on appeal it seems clearly, the learned trial magistrate factored in the principles in **Coussens v Attorney General (1999) 1 EA 40** which largely sums up in object of assessment as follows:

“The object of an award of damages is to give the plaintiff compensation for the damage, loss or injury he or she has suffered and the heads or elements of damage recognized as such by law are divisible into two main groups: Pecuniary and non-pecuniary loss, with the former comprising of financial and material loss incurred such as loss of business profits, loss of income or expenses such as medical expenses, while the latter comprises all losses which do not represent in road upon a person’s financial or material assets such as physical pain or injury to feelings See also (Butler v Butler (supra)).

If anything more was needed in support of the foregoing is an account to factor inflation and passage of time regarding measure of damages applicable in reference to past awards and the appropriate current matter before the trial court. As a reminder more often than not the principle in **Lusia Muro v Lochab Brothers and another (1991) KLR 616** is usually forgotten when it comes to assessment of damages. The court held inter alia *“that a person is not compensated for pay physical injury, he is compensated for the loss which he suffers as a result of the injury. The plaintiff will not be compensated for having serious injuries but for her inability to lead a full life.”* See **Janet Ndiare v Kenya Bus Services and another Civil Appeal No. 121 of 1987.**

From the decision in **Kemfro Africa Ltd** (supra) the result therefore is that in my view this appeal is unmeritorious and deserves to be dismissed with costs as there can be no question of interfering with the judgement. It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 15TH DAY OF APRIL, 2020.

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R. NYAKUNDI

JUDGE

In the presence of: -

Ms Mulwa for Mr. Kirui for the appellant

Mr. Ating for Mr. Sewe for the respondent